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No. 237

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

STATE OF ILLINOIS,
Petitioner,

v.

COMMONWEALTH EDISON COMPANY, et al.,
Respondents-Plaintiffs

and

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,
Respondents-Defendants

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 24(a) and (b) ..... *passim*

4 Moore's Federal Practice ¶¶ 24.03-24.05, 24.07, 24.08 (1962) 7, 8

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BRIEF FOR RESPONDENTS-DEFENDANTS IN OPPOSITION

QUESTION PRESENTED

Whether the State of Illinois, claiming to represent certain Illinois consumers of electric power, may intervene *as of right* under Rule 24(a) of the Federal Rules of Civil Procedure in private antitrust actions brought by certain Illinois, Indiana and Iowa utilities against manufacturers of electrical equipment for damages allegedly resulting from fixed prices charged for such equipment.

RULE INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure is as follows:

> "(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

STATEMENT

In the District Court the Attorney General of Illinois sought to intervene in these actions in two distinct capacities under two different legal theories. First, as set forth in his brief to the Court of Appeals, "*permissively*, the Illinois Attorney General sought to intervene [under Rule 24(b)] on behalf of the state agencies and institutions who had made *purchases* of the involved electrical equipment. . . ." (Pet. C.A. Br. 3, emphasis added)[1]. In the proposed complaint attached to the motion to intervene the State alleged that as a purchaser it had been directly injured by alleged violations of the antitrust laws on the part of defendants and it sought damages directly from defendants. The District Court refused permission to intervene on this ground because such "suits will [in themselves] approach unmanageable proportions both in preparation and trial . . . and will unduly delay and prejudice the adjudication

1. Brief of Appellant, State of Illinois, Proposed Intervenor as Party Plaintiff, to Court of Appeals for the Seventh Circuit; hereinafter cited as "Pet. C.A. Br. ."

of the rights of the original parties." (Pet. 19.)[2] The Court of Appeals affirmed (Pet. 25), and the petition here does not seek further review of the lower courts' denial of permission for the State to intervene as a purchaser of electrical equipment.

Second, "*as of right*, the State of Illinois sought to appear [pursuant to Rule 24(a)] in order to represent and protect the interests of the '. . . *consumers*" of electrical energy which had been supplied by the four Illinois plaintiff utilities, in order to share in whatever "recoveries . . . may be realized [by the plaintiff utilities] in these proceedings . . . ." (Pet. C.A. Br. 2-3, emphasis added.) The District Court's denial of intervention as of right on behalf of consumers, as affirmed by the Court of Appeals, is the *sole issue* which the State now asks this Court to review.

REASONS FOR DENYING THE WRIT

The result reached by the District Court and affirmed by the Court of Appeals on the basis of exhaustive argument—that the State as representative of consumers has no right under Rule 24(a) to intervene in these actions—accords with settled constructions of Rule 24(a). The State has clearly failed to meet the explicit requirements imposed by the Rule and the decisions of this Court interpreting it. No new or even significant federal question is presented for review; intervention has consistently been denied in similar cases, and the State cites no authority to the contrary. The State's intervention would moreover unduly and unnecessarily confuse these already complex cases. Accordingly, its request has been uniformly opposed by plaintiffs and defendants alike. Under these circumstances, no con-

2. Petition for writ of Certiorari and accompanying Appendix; hereinafter cited as "Pet."

ceivable reason exists for this Court to grant the review which the petition requests.

1. While citing as error certain of the reasons advanced by the Court of Appeals for affirming the District Court's denial of intervention, the petition neglects to present an affirmative theory supporting the claimed *right* of consumers to intervene in these cases. The theory of the State's proposed complaint remains, therefore, the touchstone for consideration of the State's motion on its merits.

As ground for its motion to intervene under Rule 24(a)(3), the State asserted that "the recovery of . . . damages by these plaintiffs [the utilities] will create a fund for distribution . . . in which . . . consumers . . . have a direct interest" and that the Attorney General as representative of these consumers sought "to protect the public interest involved in the proper disposition of such a fund." (R. 18-19.)[3] In the portion of its proposed complaint dealing with its claim as a representative of consumers, the State did not assert any claim against defendants. It sought merely to have "any damages which shall be awarded herein to [the named Illinois utilities] . . . refunded on an equitable and proportionate basis to the consumer-customers of said [utilities] . . ." (R. 23), on the theory that electrical rates "were based upon and included the cost and expense of purchases of electrical equipment at fixed, excessive and non-competitive prices", and that consumers "accordingly were required to pay rates and charges for public utility services which were higher than would have been the case if the prices paid for the electrical equipment here involved had been purchased at prices resulting from the operation of free and open competition." (R. 22-23.) Because damages were thus "passed on" to consumers, petitioner

3. Record (Certified Copy of Printed Appendix For the use of the Court Below); hereinafter cited as "R."

argued, the consumers were therefore entitled to intervene in these cases under Rule 24(a)(3) in order to share in a "fund" consisting of whatever damages might possibly be awarded the plaintiff utilities.

The fallacy in the theory of petitioner's motion and complaint is that to the extent the higher prices allegedly paid for electrical equipment were "passed on" to the consumers through higher electrical rates, the plaintiff utilities were not damaged. Under petitioner's theory, it must follow that the damages, if any, which ultimately may be awarded plaintiffs in these actions will include only the damages actually borne by the plaintiff utilities and will not include amounts passed on to consumers. Therefore, petitioner has not even the color of a claim of right to intervene under Rule 24(a)(3) to share in any "fund" which might conceivably be created at some future date by an award of damages in these actions.

It is, however, unnecessary for the Court to determine whether consumers would in fact have such an interest because Rule 24(a)(3) is not satisfied by the mere contingency that a "fund" may come into existence at some future date. The courts have consistently recognized that the Rule expressly requires the existence of "*property* which *is*" in the court's custody. (Emphasis added.) See, *e.g.*, *Hunt Tool Co.* v. *Moore, Inc.*, 212 F.2d 685 (5th Cir. 1954); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 141 F.2d 27 (7th Cir. 1944); *Babcock* v. *Town of Erlanger*, 34 F. Supp. 293 (E.D. Ky. 1940); and *Harrington Bros.* v. *City of New York*, 35 F.2d 1009 (S.D. N.Y. 1929). The absence of such a presently existing "fund" is fatal to the State's intervention under subsection (3).

2. Apparently recognizing the fundamental fallacy in the theory of its complaint, petitioner now urges to this Court a nebulous remedy as against defendants which it

suggests somehow entitles consumers, whom it claims to represent, to intervene as a matter of right under Rule 24(a)(2). (Pet. 10.) But subsection (2) gives a right to intervene only "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. . . ." By its own admission petitioner does not meet this test.

Petitioner conceded in the trial court that the "consumer-customers [whom it claims to represent] are not parties to this suit, and, therefore, under the principles of *res judicata* are not bound. . . ." (Pet. D.C. Memo. 19)[4], and petitioner does not contend before this Court that a judgment in the main action will be *res judicata* as to it or the consumers. (Pet. 10.) That Rule 24(a)(2) incorporates the doctrine of *res judicata* is conclusively established by the decisions of this Court in *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19 (1951) and *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961). In the *Sutphen* case—a government antitrust suit brought to divide Warner Brothers—this Court denied intervention to a lessor of theatre properties because "the decree in this case . . . is not *res judicata* of the rights sought to be protected through intervention." (342 U.S. at 21.) In the even more recent *Sam Fox Publishing* case, this Court, applying traditional standards of *res judicata*, refused intervention under Rule 24(a)(2) to an association of writers and publishers in a proceeding to modify an antitrust decree. Although recognizing that "the very existence of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree", the

4. Memorandum of the State of Illinois In Support of Motion to Intervene as Party Plaintiff, to District Court for Northern District of Illinois (Eastern Division).

Court nevertheless ruled that such adverse effect (far more serious than is alleged by the petitioner here) "is not at all the equivalent of being *legally bound*, which is what must be made out before a party may intervene as of right" under Rule 24(a)(2). (366 U.S. at 694, emphasis added.)[5]

Furthermore, the history of Rule 24(a)(2) shows that it was not intended to expand the *right* to intervene as it existed at the time of the adoption of the Federal rules but merely to restate the established federal practice which allowed intervention as a matter of right only when the judgment in the main action would be *res judicata* as to the applicant.[6]

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5. The three cases cited to support petitioner's argument to the contrary (Pet. 10) have been superseded by the above-cited decision of this Court and subsequent holdings in the same circuits. See, *e.g.*, *Hurd* v. *Illinois Bell Telephone Co.*, 234 F.2d 942 (7th Cir.), *cert. den.* 352 U.S. 918 (1956); *Stadin* v. *Union Electric Co.*, 309 F.2d 912, 918 (8th Cir. 1962). See also *Cameron* v. *President and Fellows of Harvard College*, 157 F.2d 993 (1st Cir. 1946); *Formulabs, Inc.* v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir.), *cert. den.* 363 U.S. 830 (1960); *Archer* v. *United States*, 268 F.2d 687 (10th Cir. 1959); *United States* v. *Wilhelm Reich Foundation*, 17 F.R.D. 96 (D. Me. 1954), *aff'd mem. sub nom. Baker* v. *United States*, 221 F.2d 957 (1st Cir.), *cert. den.* 350 U.S. 842 (1955).

6. See *Proceedings of the Institute on the Federal Rules of Civil Procedure* (Washington, D.C., October, 1938), p. 57; *Id.* (Cleveland, Ohio, July, 1938), p. 265; 4 *Moore's Federal Practice*, ¶¶24.03-05, 24.08 (1962); Moore & Levi, *Federal Intervention: The Right to Intervene and Reorganization*, 45 Yale L.J. 565, 591 (1936) (a study of federal practice relied upon by the draftsmen of the Federal Rules; see notes of the Advisory Committee following Rule 24).

In arguing for consideration of the collateral question of consumers' "interest" under the antitrust laws, the State misconceives the purpose of Rule 24(a), which is to make possible a determination of the right to intervention on the comparatively easily determinable basis of *res judicata*, rather than on the more hazy question of "interest". See *Moore's Federal Practice*, ¶24.08 (1962). See also Note, 63 Yale L.J. 408, 411, 415 (1954).

3. The discussion of the substantive rights of consumers, to which the petition is largely devoted, is not relevant to the issue raised by denial of the State's motion to intervene as of right on the consumers' behalf. The problem here is purely one of petitioner's rights under Rule 24(a), and petitioner has not shown such a right either here or in the courts below. It is manifestly unnecessary on such a motion for the Court to concern itself with the State's hypothetical discussion of whether consumers have a compensable interest under the antitrust laws or with its tenuous speculations concerning the ultimate disposition of damages, if any, which may conceivably be awarded. To do so would be to confuse the question of the "right to intervene" with that of the "rights of the intervenor", questions which, as Professor Moore has pointed out, should be kept distinct. See 4 *Moore's Federal Practice*, ¶24.07 (1962). The determination that consumers have no right to the *procedural* expedient of intervention in these proceedings is not a determination that they have no *substantive* rights, as against either defendants or the plaintiff utilities, nor does it foreclose their independent pursuit of such rights. Indeed, although the State now contends that intervention affords the "sole avenue for protection of" consumers (Pet. 8), its brief below to the Court of Appeals explicitly asserted that alternative remedies exist apart from intervention. (Pet. C.A. Br. 17, n. 3.) Clearly, questions concerning the existence or delineation of their substantive rights are simply not presented on a motion under Rule 24(a).

4. Finally, the result below must be approved for the cumulative reason that the Attorney General has no legal authority to represent the private rights of consumers of electricity. Under Illinois law, the Attorney General is authorized to participate only in matters where the "State is "directly interested" and "may not appear [in cases]

where but a part of the public are interested." *People* v. *Marquette Nat'l Fire Ins. Co.*, 351 Ill. 516, 524, 527, 184 N.E. 800, 803, 804 (1933). Here, only a portion of the public (the customers of certain of the plaintiffs) are even claimed to have the interest which the Attorney General seeks to protect.[7] Furthermore, their "interest", asserted as stemming from a private right to share in such damages as may be collected by the plaintiff utilities from the defendants, is obviously private. It does not, therefore, involve the protection of the general welfare of all citizens which is essential to support Illinois' claimed right to represent consumers here. *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 396 (1938); *Kansas* v. *Colorado*, 185 U.S. 125, 142 (1902); *Land O'Lakes Creameries* v. *Louisiana State Bd. of Health*, 160 F. Supp. 387 (E.D. La. 1958).

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7. It should also be noted that although the plaintiff utilities involved in these actions sell to consumers in Illinois, Indiana and Iowa, neither the Attorneys General nor any other representatives of electrical consumers in Indiana or Iowa have sought to intervene here.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

Dated: July 25, 1963.

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REPLY BRIEF.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

It is respectfully submitted that the briefs of the respondents in opposition to the petition for certiorari, far from suggesting that certiorari should be denied, make it clear that certiorari should be granted for the reasons set out in the petition.

First. The respondents-plaintiffs assert that petitioner's "argument that the court of appeals has misconstrued the